

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

CORY SPENCER, an individual;
DIANA MILENA REED, an
individual; and COASTAL
PROTECTION RANGERS, INC., a
California non-profit public benefit
corporation,

Plaintiffs,

v.

LUNADA BAY BOYS; THE
INDIVIDUAL MEMBERS OF THE
LUNADA BAY BOYS, including but
not limited to SANG LEE, BRANT
BLAKEMAN, ALAN JOHNSTON
aka JALIAN JOHNSTON,
MICHAEL RAE PAPAYANS,
ANGELO FERRARA, FRANK
FERRARA, CHARLIE FERRARA
and N.F.; CITY OF PALOS
VERDES ESTATES; CHIEF OF
POLICE JEFF KEPLEY, in his
representative capacity; and DOES 1-
10,

Defendants.

Case No. CV 16-02129-SJO (RAOx)

**REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE
JUDGE ON MOTION FOR
SANCTIONS AGAINST
DEFENDANTS CHARLIE FERRARA,
FRANK FERRARA, AND SANG LEE**

This Report and Recommendation ("Report") is submitted to the Honorable
S. James Otero, United States District Judge, pursuant to 28 U.S.C. § 636 and

1 General Order 05-07 of the United States District Court for the Central District of
2 California, and pursuant to the District Court's referral order in this matter dated
3 August 28, 2017.

4 **I. INTRODUCTION**

5 On August 22, 2017, Plaintiffs Coastal Protection Rangers, Inc., Diana
6 Milena Reed, and Cory Spencer (collectively, "Plaintiffs") filed a Motion for
7 Sanctions ("Motion") against Defendants Charlie Ferrara and Frank Ferrara
8 (collectively, the "Ferrara Defendants"), and Defendant Sang Lee. Dkt. No. 425.
9 The Motion is based on the alleged failure to preserve or destruction of evidence
10 related to communications between codefendants on their cellular phones. The
11 Motion was referred to the undersigned by District Judge Otero on August 28, 2017
12 for a Report and Recommendation. Dkt. No. 435.

13 The Court held telephonic hearings regarding the Motion and other referred
14 matters on September 5, 2017 ("September 5 hearing") and September 12, 2017
15 ("September 12 hearing"). Dkt. Nos. 443, 452. The Court ordered Plaintiffs to
16 meet and confer with Defendant Lee and the Ferrara Defendants to assess whether
17 the allegedly spoliated evidence could be recovered and to determine the scope of
18 any unrecoverable evidence. Dkt. No. 452. The parties submitted joint status
19 reports on their meet and confer efforts, and the Court ordered further briefing on
20 the Motion. Dkt. Nos. 458, 459, 461.

21 On September 28, 2017, Plaintiffs filed their supplemental brief in support of
22 their Motion. Dkt. No. 468.¹ The MPA is supported by the declaration of William
23 T. Kellerman ("Kellermann Declaration"), Dkt. No. 468-2, and the declaration of
24 _____

25 ¹ Plaintiffs filed their brief as a separate motion for sanctions against Defendant Lee
26 and the Ferrara Defendants. However, the arguments in the supplemental brief
27 build upon the arguments presented in the Motion filed on August 22, 2017. The
28 Court will refer to Plaintiffs' Memorandum of Points and Authorities ("MPA")
attached to the September 28, 2017 filing as the primary moving arguments of
Plaintiffs in support of their Motion.

1 Samantha D. Wolff (“Wolff Declaration”), Dkt. No. 468-4. Plaintiffs contend that
2 Defendant Lee and the Ferrara Defendants spoliated relevant evidence, resulting in
3 the loss of contents of text messages exchanged between Defendant Lee and the
4 Ferrara Defendants and the loss of cellular phone billing records for Defendant
5 Charlie Ferrara. Plaintiffs request that the Court impose sanctions in the form of an
6 adverse inference or jury instruction and denial of Defendants’ motions for
7 summary judgment.

8 Defendant Lee filed his Opposition to the Motion on October 5, 2017 (“Lee
9 Opposition”). Dkt. No. 472. The Lee Opposition is supported by the declaration of
10 Giselle Morales (“G. Morales Declaration”), Dkt. No. 472-1, and the declaration of
11 Tera Lutz (“Lutz Declaration”), Dkt. No. 472 at 12-82. Defendant Lee argues that
12 he did not intentionally delete text messages with codefendants and that Plaintiffs
13 have not been prejudiced by this loss.

14 The Ferrara Defendants filed their Opposition to the Motion on October 5,
15 2017 (“Ferrara Opposition”). Dkt. No. 473. The Ferrara Opposition is supported
16 by the declaration of Courtney Serrato (“Serrato Declaration”), Dkt. No. 473-1, the
17 declaration of Alison K. Hurley (“Hurley Declaration”), Dkt. No. 484-1,² and the
18 declaration of Alex Morales (“A. Morales Declaration”), Dkt. No. 474. The Ferrara
19 Defendants also filed evidentiary objections. Dkt. No. 473-2. In their Opposition,
20 the Ferrara Defendants concede that their initial responses to Plaintiffs’ discovery
21 requests did not meet the Court’s standards or expectations. But they argue that
22 there was no intentional spoliation of any relevant or admissible evidence.

23 Plaintiffs filed their Reply to the Lee Opposition (“Lee Reply”) and their
24 Reply to the Ferrara Opposition (“Ferrara Reply”) on October 9, 2017. Dkt. Nos.

25 ² The declaration of Alison K. Hurley attached to the Ferrara Opposition failed to
26 include certain exhibits. *See* Dkt. No. 473-3. The Ferrara Defendants filed a notice
27 of errata and re-submitted the Hurley Declaration with all exhibits attached. Dkt.
28 No. 484. The Court will refer to the Hurley Declaration found at Dkt. No. 484-1
for purposes of this Report.

1 477-478. The Lee Reply and Ferrara Reply are supported by the declaration of
2 Samantha D. Wolff (“Wolff Reply Declaration”). Dkt. No. 477-1. Plaintiffs also
3 filed responses to the Ferrara Defendants’ evidentiary objections, Dkt. No. 479, and
4 objections to evidence in the Ferrara Opposition, Dkt. No. 480.

5 The Ferrara Defendants filed their responses to Plaintiffs’ evidentiary
6 objections on October 10, 2017. Dkt. No. 485.

7 The Court held a hearing for the Motion on October 12, 2017 (“October 12
8 hearing”) and took the matter under submission. Dkt. No. 489.

9 Having considered the parties’ moving and opposing papers and other
10 records in this case, as well as the statements and arguments made during the
11 related telephonic conferences and hearings, for the reasons set forth below, the
12 Court recommends that Plaintiffs’ Motion be granted in part.

13 **II. BACKGROUND**

14 **A. Procedural Background**

15 Plaintiffs filed their Complaint on March 29, 2016, against the Lunada Bay
16 Boys, Sang Lee, Brant Blakeman, Alan Johnston, Michael Papayans, Angelo
17 Ferrara, Frank Ferrara, Charlie Ferrara, N.F., City of Palos Verdes Estates, and
18 Chief of Police Jeff Kepley (collectively, “Defendants”).³ Dkt. No. 1. Plaintiffs
19 assert the following causes of action against Defendants: (1) violation of the Bane
20 Act, California Civil Code § 52.1(b), against the Lunada Bay Boys and Individual
21 Defendants; (2) public nuisance pursuant to California Civil Code §§ 3479 and
22 3480 against the Lunada Bay Boys and Individual Defendants; (3) violation of the
23 Equal Protection Clause of the Fourteenth Amendment to the United States
24 Constitution, pursuant to 42 U.S.C. § 1983, against City Defendants; (4) violation
25

26 ³ Defendant N.F. was dismissed from this action without prejudice on July 27,
27 2017. Dkt. No. 297. The Court will refer to Defendants Lee, Blakeman, Johnston,
28 Papayans, Angelo Ferrara, Frank Ferrara and Charlie Ferrara collectively as the
“Individual Defendants.”

1 of the Privileges and Immunities Clause of Article IV of the United States
2 Constitution, pursuant to § 1983, against City Defendants; (5) violation of various
3 provisions of the California Coast Act against Defendants; (6) assault against the
4 Lunada Bay Boys and Individual Defendants; (7) battery against the Lunada Bay
5 Boys and Individual Defendants; and (8) negligence against the Lunada Bay Boys
6 and Individual Defendants. *See* Compl. ¶¶ 43-106.

7 Plaintiffs allege that the Individual Defendants and other members of the
8 Lunada Bay Boys have unlawfully interfered with Plaintiffs' usage and enjoyment
9 of Lunada Bay, located in the Palos Verdes Estates area. *See* Compl. ¶¶ 15-26.
10 Plaintiffs allege that Lunada Bay is well-known in the surfing world for localism, a
11 practice whereby resident surfers attempt to exclude outsiders through threats,
12 intimidation, and violence. *See id.* ¶ 17. Plaintiffs allege that Plaintiff Spencer
13 visited Lunada Bay on two occasions in January and February 2016, and was
14 verbally harassed, threatened, and physically injured by members of the Lunada
15 Bay Boys. *Id.* ¶ 21. Plaintiff Reed visited Lunada Bay on January 29, 2016,
16 February 5, 2016, and February 13, 2016, and was allegedly harassed by the
17 Lunada Bay Boys. *Id.* ¶¶ 22-26. Plaintiffs allege that members of the Lunada Bay
18 Boys coordinate their attacks on visitors by, among other actions, communicating
19 via text message group chats, email, mobile phones, and other electronic devices.
20 *See id.* ¶¶ 18, 47, 59.

21 On July 11, 2016, Plaintiffs' claims pursuant to the Privileges and Immunities
22 Clause and the California Coast Act were dismissed with prejudice by the District
23 Judge. *See* Dkt. No. 84. On February 21, 2017, the District Judge denied
24 Plaintiffs' motion for class certification. *See* Dkt. No. 225.

25 On August 8, 2017, Plaintiffs filed their Motion for Administrative Relief
26 Pursuant to FRCP 56(d) ("Rule 56(d) Motion"). Dkt. No. 397. On August 22,
27 2017, Plaintiffs filed their Motion for Sanctions. Dkt. No. 425. On August 28,
28 2017, the District Court referred to the undersigned Plaintiffs' Rule 56(d) Motion

1 for disposition and Plaintiffs' Motion for Sanctions for a Report and
2 Recommendation. Dkt. No. 435 ("Referral Order"). The District Court also
3 authorized the undersigned to consider all pending discovery matters and conduct
4 further hearings and proceedings as may be appropriate or necessary. *Id.*

5 The parties have been involved in a number of discovery disputes before the
6 undersigned, starting in November 2016. *See, e.g.*, Dkt. Nos. 141, 151, 212, 217.
7 The Court has permitted the parties to contact the Court for discovery disputes so
8 that, when possible, disputes can be resolved informally without extensive briefing.
9 *See, e.g.*, Dkt. No. 212 (directing the parties to contact the Court's Courtroom
10 Deputy Clerk to schedule a telephonic conference if the parties are unable to reach
11 a resolution through meet and confer efforts). The background and proceedings
12 specific to Defendant Lee and the Ferrara Defendants are addressed below.

13 **B. Defendant Lee**

14 Defendant Lee was served with the Complaint on June 21, 2016. *See* Dkt.
15 No. 82. Defendant Lee retained counsel on July 5, 2016. *See id.* On July 6, 2016,
16 Plaintiffs served Defendant Lee with a litigation hold letter. Wolff Reply Decl. ¶ 2
17 & Ex. 1. Defendant Lee filed his Answer to the Complaint on August 1, 2016.
18 Dkt. No. 94. On August 18, 2016, Defendant Lee submitted his cellular phone to a
19 forensic analyst for imaging and an extraction report. Lutz Decl. ¶ 2

20 On November 7, 2016, Plaintiffs propounded requests for production of
21 documents on Defendant Lee. Wolff Decl. ¶ 8 & Ex. 7. The requests sought,
22 among other things, any text messages or records of phone calls with a codefendant
23 in this matter. Wolff Decl. Ex. 7. Defendant Lee produced a redacted copy of his
24 562-page extraction report to Plaintiffs on December 12, 2016. Lutz Decl. ¶ 3. The
25 extraction report included 17 occasions of text messages exchanged with
26 codefendants in this matter, including Defendants Blakeman, Johnston, and the
27 Ferrara Defendants, but with no substance of the text messages. Wolff Decl. ¶ 11;
28 Lee Opp'n at 3; Lutz Decl. ¶¶ 3-4 & Exs. A-B.

1 At a July 13, 2017 hearing, Plaintiffs raised a dispute with Defendant Lee
2 regarding the heavy redactions in his extraction report and the asserted privileges in
3 his privilege log. *See* Dkt. No. 267. The Court directed the parties to meet and
4 confer to schedule a further telephonic conference regarding the dispute and to file
5 the redacted privilege log along with any prior meet and confer documents. *See id.*
6 On July 19, 2017, the Court held a telephonic hearing for the discovery dispute, and
7 ordered Defendant Lee to lodge an unredacted copy of the extraction report for an
8 *in camera* review. Dkt. No. 273. The Court conducted an *in camera* review and
9 held another telephonic hearing on July 25, 2017. Dkt. No. 290. The Court ordered
10 Defendant Lee to produce his extraction report, limiting redactions only to sensitive
11 personal photographs, Defendant Lee's residential address, and communications
12 between Defendant Lee and his attorneys. *Id.*

13 On August 7, 2017, Plaintiffs filed their motion to compel against Defendant
14 Lee. Dkt. No. 392. Plaintiffs requested that Defendant Lee be ordered to produce
15 all documents that had not been turned over, and requested a ruling that the
16 objections and asserted privileges are not proper. *Id.* at 5. Plaintiffs also sought an
17 order that Defendant Lee and his attorneys improperly withheld documents and that
18 Defendant Lee destroyed evidence. *Id.* On August 9, 2017, the Court denied the
19 motion as untimely. Dkt. No. 401. The Court noted that to the extent Plaintiffs'
20 motion related to alleged spoliation, the Court believed the motion would be
21 properly brought before the District Court. *Id.*

22 After the Motion for Sanctions was referred to the undersigned, the Court
23 directed Plaintiffs and Defendant Lee to meet and confer regarding the possibility
24 of extracting any further data from Defendant Lee's phone. *See* Dkt. Nos. 443, 452.

25 On September 18, 2017, Plaintiffs and Defendant Lee filed their joint status
26 report regarding further extraction efforts. Dkt. No. 458. The status report
27 provided that the vendor's tools had not recovered any additional text messages. *Id.*
28 A forensic analyst completed a physical extraction of Defendant Lee's phone, and

1 performed several additional tests. Lee Opp'n at 4; G. Morales Decl. ¶¶ 12-16.
2 Although the contents of some text messages were found, none related to the text
3 messages requested by Plaintiffs. Lee Opp'n at 4; G. Morales Decl. ¶ 16. Because
4 the contents of the text messages at issue could not be recovered, the parties
5 submitted their supplemental briefing on spoliation based on these unrecoverable
6 text messages. Dkt. Nos. 468, 472, 478.

7 **C. The Ferrara Defendants**

8 There is no record of when the Ferrara Defendants were served with the
9 Complaint. On July 26, 2016, Plaintiffs filed a proof of service stating that a copy
10 of the Notice of Initial Scheduling Conference was sent to the Ferrara Defendants
11 on July 26, 2016 via UPS. Dkt. No. 91. The Ferrara Defendants first appeared in
12 the case through their counsel's appearance at the August 29, 2016 initial
13 scheduling conference. Dkt. No. 120. The Ferrara Defendants filed their Answers
14 to the Complaint on September 2, 2016. Dkt. Nos. 124-125.

15 On November 16, 2016, Plaintiffs propounded requests for production on the
16 Ferrara Defendants. Wolff Decl. ¶ 8 & Exs. 3-4. The requests sought, among other
17 things, text messages or records of phone calls with a codefendant. Wolff Decl.
18 Exs. 3-4.

19 The Ferrara Defendants served their responses on December 19, 2016. Wolff
20 Decl. ¶ 9 & Exs. 5-6. In their responses, the Ferrara Defendants stated that they did
21 not possess any responsive text messages or records of phone calls and they
22 objected to the requests as burdensome. *Id.* The Ferrara Defendants did not
23 produce any documents with their responses. Wolff Decl. ¶ 9.

24 On December 29, 2016, Defendant Lee produced an extraction report
25 evidencing communications with codefendants, including the Ferrara Defendants.
26 *Id.* ¶ 10.

27 From January to July 2017, Plaintiffs' counsel communicated with the
28 Ferrara Defendants' counsel at least 17 times via phone, email and letter, seeking

1 the production of responsive documents. *Id.* ¶ 12. Defendant Charlie Ferrara was
2 deposed on July 7, 2017. Wolff Decl. ¶ 14 & Ex. 9. At his deposition, Charlie
3 Ferrara stated that he “hadn’t tried very hard” to obtain his cell phone bills. *Id.* As
4 late as July 10, 2017, counsel for the Ferrara Defendants responded that they were
5 attempting to obtain phone records and would inquire into imaging the data on the
6 Ferrara Defendants’ cellular phones. Wolff Decl. Ex. 10.

7 The Court held a telephonic hearing on July 13, 2017 regarding production of
8 cellular phone records by the Ferrara Defendants. Dkt. No. 267. The Court ordered
9 the Ferrara Defendants to produce responsive documents by July 17, 2017. *Id.*

10 The parties participated in another telephonic hearing on July 26, 2017, when
11 the Court was informed that the Ferrara Defendants had not completed their
12 production by the ordered deadline and had yet to complete their production as of
13 the time of the hearing. *See* Dkt. No. 296. The Court ordered briefing on
14 Plaintiffs’ request for monetary sanctions for the Ferrara Defendants’ failure to
15 comply with the Court’s July 13, 2017 order. *Id.*

16 After the July 26 hearing, the Ferrara Defendants produced additional
17 documents on July 26, 27, and September 1, 2, 5, and 21. Wolff Decl. ¶ 23.

18 Plaintiffs and the Ferrara Defendants filed their briefing on Plaintiffs’ request
19 for monetary sanctions and the Court held a hearing on August 23, 2017. Dkt. Nos.
20 403, 423, 432. The Court granted Plaintiffs’ request for monetary sanctions as it
21 pertained to the failure to comply with the Court’s July 13, 2017 order, but denied it
22 without prejudice to the extent the request was based on the Ferrara Defendants’
23 alleged spoliation of evidence. *Id.* The Court directed Plaintiffs’ counsel to submit
24 a declaration detailing expenses caused by the failure to comply with the Court’s
25 order. *Id.* On September 5, 2017, Plaintiffs’ counsel filed a declaration stating that
26 the parties agreed to resolve the request for monetary sanctions through the Ferrara
27 Defendants’ payment of the amount sought by Plaintiffs in their motion. Decl. of
28 Samantha Wolff Regarding Pls’ Mot. for Monetary Sanctions, Dkt. No. 444, ¶ 4.

1 Plaintiffs' counsel stated that Plaintiffs no longer sought the Court's assistance in
2 determining the amount to be awarded for the Ferrara Defendants' failure to
3 comply with the Court's July 13 order and that Plaintiffs would not seek any further
4 monetary sanctions from the Court for the alleged spoliation of evidence raised in
5 their request for monetary sanctions. *Id.* ¶ 5.

6 At the September 5 hearing, counsel for the Ferrara Defendants represented
7 that additional documents were still being gathered and produced, including those
8 being located by a cellular service provider. At the September 12 hearing, counsel
9 for Defendants Charlie and Frank Ferrara stated that with the exception of specific
10 older records that their third-party provider was attempting to locate, all records that
11 exist had been produced. However, counsel stated that some text message chains
12 had not been recovered. Plaintiffs and the Ferrara Defendants were directed to
13 submit a status report regarding any unrecoverable data. *See* Dkt. No. 452.

14 On September 18, 2017, Plaintiffs and the Ferrara Defendants filed their joint
15 status report. Dkt. No. 459 ("Ferrara Joint Status Report"). With respect to Frank
16 Ferrara, the joint status report provides that the contents of nine text messages
17 exchanged with Defendant Lee on March 31, 2016, April 18, 2016, and July 29,
18 2016 are the only requested records that have not been produced. *Id.* at 3. The
19 parties agreed that these messages are not recoverable. *Id.* With respect to Charlie
20 Ferrara, the joint status report provides that the contents of six text messages
21 exchanged with Defendant Lee on June 30, 2016 and July 20, 2016 are not
22 available because Defendant Charlie Ferrara no longer has a cell phone available
23 for extraction predating August 15, 2016. *Id.* at 6. In addition, the missing cell
24 phone billing records from December 15, 2015 through January 11, 2016 and
25 records of text messages from December 15, 2015 to February 24, 2016 had been
26 requested from Sprint, but Sprint had not been able to complete the request at the
27 time of filing. *Id.* at 4. Finally, any data stored on the mobile phone used by
28 Charlie Ferrara prior to August 15, 2016 are no longer available. *Id.* at 5.

1 As it appeared that there would be text messages and potentially other data
2 that would not be recoverable, the Court set a briefing schedule for Plaintiffs’
3 Motion for Sanctions and the parties filed their supplemental briefs. Dkt. Nos. 468,
4 473, 477.⁴

5 **III. LEGAL STANDARD**

6 Spoliation is the destruction or significant alteration of evidence, or the
7 failure to preserve evidence, in pending or reasonably foreseeable litigation.
8 *Compass Bank v. Morris Cerullo World Evangelism*, 104 F. Supp. 3d 1040, 1051-
9 52 (S.D. Cal. 2015) (citing *United States v. Kitsap Physicians Serv.*, 314 F.3d 995,
10 1001 (9th Cir. 2002)). The standard of proof for spoliation in the Ninth Circuit
11 “appears to be by a preponderance of the evidence.” *Ramos v. Swatzell*, Case No.
12 ED CV 12-1089-BRO (SPx), 2017 WL 2857253, at *5 (C.D. Cal. June 5, 2017);
13 *see also* *Compass Bank*, 104 F. Supp. 3d at 1052-53.

14 Federal Rule of Civil Procedure 37(e) governs the loss of electronically
15 stored information. Rule 37(e) applies “[i]f electronically stored information that
16 should have been preserved in the anticipation or conduct of litigation is lost
17 because a party failed to take reasonable steps to preserve it, and it cannot be
18 restored or replaced through additional discovery.” The advisory committee notes
19 to the 2015 Amendment provide that the amended rule “forecloses reliance on

20
21 ⁴ The Ferrara Defendants raise numerous objections to evidence Plaintiffs present in
22 support of their Motion. Dkt. No. 473-2. Plaintiffs filed a response to the
23 evidentiary objections and filed objections to evidence in the Ferrara Opposition.
24 Dkt. Nos. 479, 480. The Ferrara Defendants responded to Plaintiffs’ objections on
25 October 10, 2017. Dkt. No. 485. The Court has primarily relied on portions of the
26 declarations and exhibits that have not been objected to in arriving at its findings,
27 conclusions and recommendations. To the extent the Court relies on any evidence
28 objected to without addressing the objections, the objections are overruled. All
other evidentiary objections raised by either Plaintiffs or the Ferrara Defendants are
denied without prejudice as moot, with leave to reassert the objections at a later
stage in the proceedings. *See Reinsdorf v. Skechers U.S.A., Inc.*, 296 F.R.D. 604,
611 n.5 (C.D. Cal. 2013).

1 inherent authority or state law to determine when certain measures should be used”
2 for failure to preserve electronically stored information. Fed. R. Civ. P. 37(e),
3 Committee Notes on Rules—2015 Amendment (“Committee Notes”).

4 The common-law duty to preserve continues to apply even under Rule 37(e).
5 See Committee Notes. “A party must preserve evidence it knows or should know is
6 relevant to a claim or defense of any party, or that may lead to the discovery of
7 relevant evidence.” *Compass Bank*, 104 F. Supp. 3d at 1051. This is an objective
8 standard that asks not whether the party in fact reasonably foresaw litigation, but
9 whether a reasonable party in the same factual circumstances would have
10 reasonably foreseen litigation. *ILWU-PMA Welfare Plan Board of Trustees v.*
11 *Connecticut General Life Insurance Co.*, No. C 15-02965 WHA, 2017 WL 345988,
12 at *4 (N.D. Cal. Jan. 24, 2017). “When litigation is ‘reasonably foreseeable’ is a
13 flexible fact-specific standard that allows a district court to exercise the discretion
14 necessary to confront the myriad factual situations inherent in the spoliation
15 inquiry.” *Security Alarm Financing Enterprises, L.P. v. Alarm Protection*
16 *Technology*, Case No. 3:13-cv-00102-SLG, 2016 WL 7115911, at *3 (D. Alaska
17 Dec. 6, 2016) (quoting *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320
18 (Fed. Cir. 2011)).

19 To satisfy Rule 37(e), the electronically stored information must have been
20 lost because the party “failed to take reasonable steps to preserve them.” The
21 Committee Notes advise that courts “should be sensitive to the party’s
22 sophistication with regard to litigation in evaluating preservation efforts,” and the
23 resources available to a party.

24 Rule 37(e) authorizes two tiers of sanctions for spoliation, both of which
25 apply only if information should have been preserved in the anticipation or conduct
26 of litigation, a party failed to take reasonable steps to preserve the information,
27 information was lost as a result, and the information could not be restored or
28 replaced by additional discovery. See Committee Notes.

1 Under Rule 37(e)(1), upon a finding of prejudice to another party from loss
2 of the information, a court may employ measures “no greater than necessary to cure
3 the prejudice.” Rule 37(e)(1) does not place a burden of proving or disproving
4 prejudice on one party or the other. *See* Committee Notes. Curative measures
5 under subdivision (e)(1) must not have the effect of measures permitted under
6 subdivision (e)(2). *Id.*

7 If a court finds that the spoliating party “acted with the intent to deprive
8 another party of the information’s use in the litigation,” Rule 37(e)(2) permits a
9 court to impose harsh sanctions, including presuming that the lost information was
10 unfavorable to that party, instructing the jury that it may or must presume the
11 information was unfavorable to that party, dismissing the action, or entering a
12 default judgment. However, finding an intent to deprive does not require a court to
13 adopt any of the measures listed in subdivision (e)(2). *Id.* “Rule 37(e) intentionally
14 leaves to the court’s discretion exactly what measures are necessary.” *Matthew*
15 *Enter., Inc. v. Chrysler Grp. LLC*, 2016 WL 2957133, at *3 (N.D. Cal. May 23,
16 2016).

17 Rule 37(e)(2) does not prohibit a court from allowing the parties, as a
18 measure under subdivision (e)(1), to present evidence to the jury concerning the
19 loss and likely relevance of information and instructing the jury that it may consider
20 that evidence, along with all the other evidence in the case, in making its decision.
21 *See* Committee Notes.

22 For spoliation of evidence that is not electronically stored, a district court
23 may sanction the offending party pursuant to its inherent powers. *Knickerbocker v.*
24 *Corinthian Colleges*, 298 F.R.D. 670, 678 (W.D. Wash. 2014) (citing *Unigard Sec.*
25 *Ins. Co. v. Lakewood Engineering & Mfg. Corp.*, 982 F.2d 363, 371 (9th Cir.
26 1992)). Courts often apply a three-part test in determining whether sanctions
27 pursuant to the court’s inherent authority are warranted for spoliation of evidence:
28 (1) whether the party having control over the evidence was obligated to preserve it

1 when it was destroyed or altered; (2) whether the destruction or loss was
2 accompanied by a culpable state of mind; and (3) whether the evidence that was
3 destroyed was relevant to the claims or defenses of the party seeking discovery of
4 the spoliated evidence. *See, e.g., Zubulake v. UBS Warburg LLD*, 220 F.R.D. 212,
5 216 (S.D.N.Y. 2003); *Montoya v. Orange County Sheriff's Dep't.*, 2013 WL
6 6705992, at *7, Case No. SACV 11-1922 JGB (RNBx) (C.D. Cal. Oct. 15, 2013).
7 If the court finds that spoliation occurred, it is tasked with imposing sanctions
8 "commensurate to the spoliating party's motive or degree of fault in destroying the
9 evidence." *Apple, Inc. v. Samsung Electronics Co.*, 888 F. Supp. 2d 976, 992 (N.D.
10 Cal. 2012).

11 **IV. DISCUSSION**

12 **A. Evidence at Issue and Applicability of Rule 37(e)**

13 Plaintiffs contend that 65 text messages exchanged between Defendant Lee
14 and other codefendants have not been produced and are no longer recoverable.
15 MPA at 5-6. Defendant Lee contends that only 17 text messages with codefendants
16 are no longer recoverable. Lee Opp'n at 3. Although there is a discrepancy as to
17 the number of text messages at issue, the parties agree that the content of at least 17
18 text messages responsive to Plaintiffs' discovery requests are no longer recoverable.

19 With respect to Defendant Frank Ferrara, the parties are in agreement that
20 there are nine text messages exchanged with Defendant Lee on March 31, 2016,
21 April 18, 2016, and July 29, 2016, that are not recoverable. Ferrara Joint Status
22 Report at 3.

23 With respect to Defendant Charlie Ferrara, at least six text messages
24 exchanged with Defendant Lee on June 30, 2016 and July 20, 2016, are no longer
25 recoverable. Ferrara Joint Status Report at 6; MPA at 6.⁵ Cellular data stored on
26

27 ⁵ Although Plaintiffs state in their MPA that seven text messages are at issue,
28 Charlie Ferrara contends that the communication on July 19, 2016 between him and

1 Defendant Charlie Ferrara's phone that he traded in on August 15, 2016 is not
2 recoverable. Ferrara Joint Status Report at 4. In addition, billing records for the
3 time period December 15, 2015 through January 11, 2016 and records of text
4 messages exchanged between December 15, 2015 and February 24, 2016 have not
5 been produced. *Id.* at 4. Although Defendant Charlie Ferrara is attempting to
6 locate these records through his cellular phone provider, the provider has not
7 confirmed that the records can be located and has not provided an estimated date of
8 production. *Id.* at 4.

9 The contents of the unrecoverable text messages were electronically stored
10 on cellular phones. As such, the Court will apply Rule 37(e) to the loss of this
11 evidence. Neither Plaintiffs nor Defendant Charlie Ferrara has represented whether
12 the cellular phone billing records are electronically stored. However, it appears
13 from the Sprint records that have been produced that the information was
14 electronically stored. *See* Hurley Decl. Ex. 16. In addition, counsel for the Ferrara
15 Defendants refers to "tape back-up" in her emails to Sprint, again suggesting that
16 the cellular phone records were electronically stored, such that they could be
17 transferred onto a back-up tape. *See* Hurley Decl. Ex. 15. The Court will thus
18 apply Rule 37(e) to the loss of the cellular phone billing records.⁶

19 It is not disputed that the contents of at least some text messages are
20 unrecoverable for Defendant Lee and each of the Ferrara Defendants. In addition,
21 there are cellular phone billing records that are missing for Defendant Charlie
22 Ferrara and there is no indication if or when the records may be recovered by his
23 cellular service provider. The Court finds that Rule 37(e)'s requirement that the
24

25 Defendant Lee was a phone call. Ferrara Opp'n at 9 n.9; Hurley Decl. ¶ 18 & Ex.
26 16.

27 ⁶ Although the Court applies the Rule 37(e) standard to the alleged spoliation in this
28 Motion, the Court notes that it would arrive at the same findings, conclusions and
recommendations had it applied the *Zubulake* standard pursuant to the Court's
inherent authority to impose sanctions for spoliation.

electronically stored information “cannot be restored or replaced through additional discovery” is satisfied for the evidence at issue.

B. Defendant Lee

i. Duty to Preserve

Plaintiffs assert that Defendant Lee’s duty to preserve arose in late March or early April 2016, given the significant press attention of the lawsuit and his frequent communications with codefendants during this time. MPA at 10. Plaintiffs submit as evidence several articles regarding the lawsuit that were published on or shortly after the date the Complaint was filed. Wolff Decl. ¶ 1 & Ex. 1. Plaintiffs present evidence that Defendant Johnston was aware of the lawsuit on March 30, 2016,⁷ Defendant Lee exchanged text messages with Defendant Johnston on March 31, 2016, and Defendant Lee had an 18-minute phone call with Defendant Johnston on April 6, 2016. MPA at 2; Wolff Decl. ¶ 6. Plaintiffs also point to several other communications between codefendants that occurred within a few weeks of the filing of the lawsuit as evidence that Defendant Lee should have been aware of the litigation shortly after the filing date. MPA at 2; Wolff Decl. ¶ 6.

Defendant Lee asserts that he was not aware of the lawsuit until he was served with the complaint on June 21, 2016.⁸ Lee Opp’n at 6. In addition, Defendant Lee contends that the duty to preserve would not apply to any of the unrecoverable text messages because they occurred months after the alleged incidents, and, for the text messages to be relevant, they must show communications between Defendant Lee and his codefendants prior to or immediately after the January and February 2016 incidents alleged in the Complaint. Lee Opp’n at 7. Defendant Lee further argues that there is no evidence

⁷ Defendant Johnston received a text message from non-party Charlie Mowat alerting Johnston and nine others about the lawsuit and to “[w]atch out for subpoenas [and] be on the ultra down-low.” Wolff Decl. Ex. 2.

⁸ The Court notes that this assertion is not supported in the Lee Opposition with a declaration of Defendant Lee or his deposition testimony.

1 to suggest any of the text messages relate to the lawsuit, and not a single defendant
2 or witness has testified they received or sent text messages to Defendant Lee
3 regarding the alleged incidents. *Id.* at 9; Lutz. Decl. ¶ 9.

4 The Court finds that Defendant Lee's duty to preserve arose, at the latest, on
5 June 21, 2016, when he was served with the Complaint. After service, Defendant
6 Lee should have been aware of the pending litigation against him and the
7 allegations involving the use of cellular phones. The parties do not dispute that
8 there are text messages between Defendant Lee and other codefendants that were
9 exchanged after Defendant Lee was served, and that the contents of these text
10 messages are unrecoverable. The Court is not persuaded by Defendant Lee's
11 argument that only text messages occurring around the dates of the incidents
12 involving Plaintiffs would be relevant, as text messages exchanged at a later time,
13 especially between codefendants, may still relate to allegations in the lawsuit.

14 Plaintiffs identify 25 text messages exchanged with codefendants after June
15 21, 2016 that are no longer recoverable, while Defendant Lee argues there are only
16 eight. Defendant Lee has not presented any argument to explain the reason for this
17 discrepancy. It appears to the Court that Plaintiffs identified the 25 text messages
18 from Defendant Lee's and others Defendants' cellular phone billing records, while
19 Defendant Lee has identified the eight text messages from his extraction report.
20 The Court finds that the billing records would contain more accurate information
21 regarding occasions when text messages were exchanged as the extraction report
22 only retrieves data from the cellular phone and such data may be overwritten.
23 Kellerman Decl. ¶¶ 6-7; G. Morales Decl. ¶¶ 19-20. Therefore, there are at least 25
24 unrecoverable text messages that were exchanged between Defendant Lee and
25 codefendants after Defendant Lee had a duty to preserve the text messages.

26 ii. Reasonable Steps to Preserve

27 Plaintiffs argue that Defendant Lee deleted the unrecoverable text messages
28 that were exchanged with codefendants between January 2016 and July 2016.

1 MPA at 5; Wolff Decl. ¶ 36. None of these text messages could be recovered from
2 Defendant Lee's phone, and only three of these text messages were produced by a
3 codefendant. MPA at 6; Lee Reply at 1. Plaintiffs confirmed the exchange of these
4 text messages through analysis of Defendants' cellular phone bills. *Id.*

5 Defendant Lee argues that he took reasonable steps to preserve cellular data.
6 Lee Opp'n at 7. Defendant Lee submitted his phone for forensic analysis, and an
7 extraction report was completed on August 18, 2017. *Id.* Additional tests were
8 also performed on his phone to extract any further data. *Id.* at 8. Defendant Lee
9 also maintains that he did not delete any of the lost text messages, and that they
10 were overwritten by a process that is not under his control. Lee Opp'n at 8. As
11 evidence, Defendant Lee points to his extraction report, which lists whether a text
12 message has been flagged for deletion. *Id.* Although 120 text messages in his
13 extraction report were flagged as deleted, none of those were with codefendants.
14 *Id.* In addition, Defendant Lee testified at his deposition taken on May 31, 2017
15 that he did not delete evidence related to the case. Lutz Decl. ¶ 6 & Ex. C.

16 Plaintiffs and Defendant Lee dispute how the contents of the unrecoverable
17 text messages were lost and whether Defendant Lee affirmatively deleted text
18 messages. Plaintiffs and Defendant Lee each submitted a declaration by an
19 individual with knowledge of computer forensic analysis. The declarants agree that
20 when a user deletes a text message on a cellular phone, it is flagged as deleted and
21 is recoverable as long as the underlying data is not overwritten. Kellerman Decl. ¶
22 6; G. Morales Decl. ¶ 20. It also appears undisputed that a typical user cannot
23 control when data is overwritten. Kellerman Decl. ¶ 8. Various factors affect when
24 data is overwritten, including the type of operating system of the device, the amount
25 of free storage, the amount of user activity, and the length of time the text message
26 was flagged for deletion. G. Morales Decl. ¶ 19. Plaintiffs' declarant states that the
27 sooner one acts to recover deleted data, the better the chances are of recovering that
28 data. Kellerman Decl. ¶ 8. Defendant Lee's declarant provides that she cannot

1 make a determination on whether a text message was deleted if the entry for that
2 text message on the extraction report does not have a “Yes” in the “flagged as
3 deleted” column of the report. G. Morales ¶ 18.

4 The Court finds that it is indeterminable from the forensic experts’
5 declarations and other evidence whether cellular phone data on Defendant Lee’s
6 phone could have been overwritten without being flagged for deletion, or if
7 Defendant Lee was aware that data from his phone was being overwritten even if
8 the data had not been flagged for deletion. Moreover, Defendant Lee imaged his
9 phone in mid-August of 2016. Given the relatively quick preservation of his
10 cellular phone after he appeared in the case, the Court cannot conclude at this time
11 that Defendant Lee failed to take reasonable steps to preserve evidence.

12 However, Plaintiffs, through no fault of their own, have not been able to
13 sufficiently explore and develop the record regarding spoliation. Defendant Lee’s
14 deposition took place in May 2017, before the Court resolved the discovery dispute
15 regarding redactions of Defendant Lee’s extraction report and ordered production
16 of an almost completely unredacted report on July 25, 2017. *See* Dkt. No. 290. In
17 addition, the number of unrecoverable text messages was only clarified after further
18 testing of Defendant Lee’s cellular phone as ordered by the Court at the September
19 5 and September 12 hearings. Plaintiffs also did not have available to them in May
20 2017 various records and documents evidencing communications with other
21 Defendants due to delays in production, which have since been resolved. *See, e.g.,*
22 Dkt. Nos. 267, 296 (Ferrara Defendants); Dkt. No. 452 (Defendant Papayans).
23 Given this timeline, the Court finds it would not be fair to expect Plaintiffs to have
24 been able to question Defendant Lee in depth at his deposition on topics relevant to
25 spoliation, such as when he became aware of the litigation, whether he took
26 reasonable steps after he became aware of the litigation, whether he deleted any of
27 the text messages at issue, and whether there was ever an intent to deprive Plaintiffs
28 of their use of the content of text messages in the litigation.

1 Accordingly, the Court recommends that, at this time, no sanctions be
2 imposed upon Defendant Lee. The Court recommends that Plaintiffs be permitted
3 to present evidence and argument at trial concerning what evidence was lost and the
4 potential relevance of such evidence, when Defendant Lee had notice of the
5 litigation,⁹ and how the evidence was lost. The Court additionally recommends that
6 Plaintiffs be permitted to take a second deposition of Defendant Lee in order to
7 further explore the alleged spoliation of text messages. Because this additional
8 discovery is not meant to be a sanction against Defendant Lee, it is recommended
9 that the costs for the second deposition be shared equally between Plaintiffs and
10 Defendant Lee.

11 **C. The Ferrara Defendants**

12 i. Duty to Preserve and Reasonable Steps to Preserve

13 a. *Defendant Frank Ferrara*

14 Plaintiffs contend that Defendant Frank Ferrara was aware of the litigation by
15 April 7, 2016, the date an article in the Daily Breeze was published regarding this
16 lawsuit. MPA at 10. Plaintiffs also argue that the Ferrara Defendants' knowledge
17 of the lawsuit can be inferred by the fact that they both attempted to dodge service
18 throughout July and August 2016. MPA at 10-11; Wolff Decl. ¶ 7. Plaintiffs argue
19 that Frank Ferrara deleted text messages with Defendant Lee, and that the Ferrara
20 Defendants' obstructive conduct evidences their willfulness to destroy evidence.
21 MPA at 11-12.

22 Defendant Frank Ferrara contends that he did not have a duty to preserve
23 until he made an appearance through counsel at the August 29, 2017 initial
24 scheduling conference. Ferrara Opp'n at 3. Defendant Frank Ferrara argues that
25

26 ⁹ Although the Court makes a finding for purposes of this Report that Defendant
27 Lee had a duty to preserve relevant evidence at the latest by June 21, 2016, the
28 Court does not intend for this finding to preclude Plaintiffs from presenting
evidence or argument at trial that his duty to preserve arose at an earlier date.

1 the quotes in the April 7, 2016 article cannot be identified as attributed to him. *Id.*
2 at 4.¹⁰ Defendant Frank Ferrara also contends that there is no evidence that he
3 intentionally destroyed the unrecoverable text messages, and that over the past
4 several months, he has made diligent efforts to produce the requested discovery.
5 Ferrara Opp'n at 5.

6 The Court finds that Defendant Frank Ferrara had a duty to preserve by April
7 7, 2016. On April 7, 2016, an article was published on the Daily Breeze website.
8 Wolff Decl. ¶ 3 & Ex. 1 at 19. The article quotes Frank Ferrara. *Id.* Defendant
9 Frank Ferrara testified at his deposition that he was contacted by Megan Barnes, the
10 author of the Daily Breeze article, and that they had a telephone conversation
11 lasting 20 to 30 minutes regarding the lawsuit, the named individual Plaintiffs of
12 the lawsuit, Lunada Bay, and some of the allegations of the lawsuit. Wolff Reply
13 Decl. Ex. 3. Specifically, Defendant Frank Ferrara testified that Ms. Barnes asked
14 him about whether he heard about individuals using walkie-talkies to coordinate
15 efforts or to harass outsiders. *Id.* In addition, Defendant Frank Ferrara testified in
16 response to a question about a phone conversation with Defendant Lee around the
17 time the lawsuit was filed that he talked about the lawsuit with Defendant Lee.
18 Hurley Decl., Ex. 3.

19 The evidence shows that Defendant Frank Ferrara became aware of the
20 lawsuit, at the latest, when he had the telephone conversation with the Daily Breeze
21 article author regarding the lawsuit, which necessarily was on or before April 7,
22 2016, the publication date of the article. Defendant Frank Ferrara became aware at
23 this time that communications between codefendants or other surfers at Lunada Bay
24 were at issue in the lawsuit. Therefore, at the latest, Defendant Frank Ferrara had a

25 ¹⁰ Defendant Frank Ferrara also objects to the April 7, 2016 article as hearsay.
26 However, the Court only uses this article to establish that on April 7, 2016, an
27 article was published with quotes from Frank Ferrara. Because the statements
28 within the article are not being used to prove the truth of the matter asserted therein,
the Ferrara Defendants' hearsay objection is overruled.

1 duty to preserve text messages and other communications with codefendants
2 starting on April 7, 2016.

3 Given this finding, the content of eight text messages exchanged on April 18,
4 2016, and July 29, 2016 between Defendant Frank Ferrara and Defendant Lee were
5 necessarily lost after Frank Ferrara had a duty to preserve.

6 The Court also finds that Frank Ferrara did not take reasonable steps to
7 preserve the contents of the text messages at issue. As with Defendant Lee,
8 Plaintiffs and Frank Ferrara dispute whether the text messages were intentionally
9 deleted. Plaintiffs and Defendant Frank Ferrara both submit declarations by
10 individuals with knowledge of forensic analysis. As with Defendant Lee, the Court
11 cannot determine whether Defendant Frank Ferrara intentionally deleted text
12 messages that are now unrecoverable. However, unlike Defendant Lee, the Court
13 has found that Frank Ferrara was aware of the lawsuit from early April 2016, yet he
14 failed to image his phone or otherwise preserve text messages with codefendants
15 until a Court order required him to produce the documents to Plaintiffs over a year
16 later. *See* Dkt. No. 267. Plaintiffs' forensic analyst declares that "the sooner one
17 acts to recover deleted data, the better the chances are of recovering that data before
18 it is overwritten." Kellerman Decl. ¶ 8. The Court finds that Plaintiffs have
19 presented sufficient evidence that the contents of the text messages were lost as a
20 result of Frank Ferrara's failure to take reasonable steps to preserve the evidence for
21 over a year after he had a duty to preserve.

22 At the October 12 hearing, as an example of how data can be deleted without
23 a user manually flagging the data for deletion, counsel stated that it is possible on
24 an older phone that when the storage capacity is at its limit, the phone may prompt
25 the user to delete older data in order to save new data. However, in this situation, it
26 appears the user does have control over whether something would be deleted off of
27 that user's phone. When under a duty to preserve certain evidence on one's phone,
28 the Court finds that it would not be reasonable to allow the phone to overwrite older

1 data that may encompass relevant evidence. Given the Ferrara Defendants' late
2 compliance with discovery requests, it would not have been reasonable for
3 Defendant Frank Ferrara to continue to have data overwritten on his phone while
4 sitting on his obligation to preserve and produce responsive data from that phone.

5 b. *Defendant Charlie Ferrara*

6 Plaintiffs contend that Defendant Charlie Ferrara must have been aware of
7 the lawsuit in late March or early April 2016 given the significant press attention
8 and his communications with codefendants, including his father, during this time.
9 MPA at 10. Plaintiffs argue that Charlie Ferrara failed to preserve relevant
10 evidence by trading in his phone after he became aware of the pending litigation.
11 *Id.* at 12. With respect to the missing cellular phone billing records, Plaintiffs
12 contend that Defendant Charlie Ferrara was not diligent in preserving the records.
13 *Id.*

14 Defendant Charlie Ferrara contends that, like Defendant Frank Ferrara, he
15 did not have a duty to preserve until he made an appearance through counsel at the
16 August 29, 2016 initial scheduling conference. Ferrara Opp'n at 3. Defendant
17 Charlie Ferrara argues that he traded his phone in on August 15, 2016, before he
18 was under any obligation to preserve evidence from it. *Id.* at 1, 10. With respect to
19 the missing cellular phone billing records, Defendant Charlie Ferrara maintains that
20 he has been working diligently to recover these documents, and has made a legal
21 demand from Sprint to retain and produce the records. *Id.* at 9-10.

22 Although there is no record of when Charlie Ferrara was served with the
23 Complaint, Plaintiffs filed a proof of service that a copy of the Notice of Initial
24 Scheduling Conference ("Notice") was sent to the Ferrara Defendants via UPS on
25 July 26, 2016. Dkt. No. 91. Although counsel for the Ferrara Defendants argued at
26 the October 12 hearing that there is no evidence that the Ferrara Defendants even
27 received this document, the fact that they retained counsel who appeared at the
28 Initial Scheduling Conference on their behalf suggests that they did receive the

1 Notice. The Court finds that the duty to preserve potentially relevant evidence
2 arose for Charlie Ferrara, at the latest, by early August 2016, when he should have
3 received the Notice.

4 Defendant Charlie Ferrara traded his phone in on or around August 15, 2016
5 when he transferred cellular phone service from Sprint to AT&T. Ferrara Joint
6 Status Report at 4-5. This took place after he had a duty to preserve potentially
7 relevant evidence, including communications with codefendants. Defendant
8 Charlie Ferrara did not preserve a backup of his cellular data from his old phone
9 and did not have his text messages properly transferred to his new phone.¹¹ The
10 lost data includes six text messages that Defendant Charlie Ferrara exchanged with
11 Defendant Lee. The Court finds that even for an individual without sophisticated
12 knowledge about litigation or forensic analysis, trading in a phone, without making
13 a backup, and after becoming aware of pending litigation where communications
14 with codefendants were potentially relevant, would constitute a failure to take
15 reasonable steps to preserve evidence.

16 Additionally, Defendant Charlie Ferrara is missing cellular phone billing
17 records that would show whether phone calls were made from December 15, 2015
18 through January 11, 2016, and records that would show whether texts were
19 exchanged from December 15, 2015 through February 24, 2016. Ferrara Joint
20 Status Report at 4. Sprint's general policy is to retain only 18 months of billing
21 records. Wolff Decl. Ex. 15. Although counsel has submitted a request to Sprint
22 for these records, Sprint has not provided counsel with an estimate or answer as to
23

24 ¹¹ Although counsel for the Ferrara Defendants argued that Charlie Ferrara had to
25 trade in his old phone for a new phone because he could not afford a new phone
26 without the credits for the old phone, this argument is not supported by testimony
27 or declaration of Charlie Ferrara. Moreover, there is no explanation or evidence as
28 to why Charlie Ferrara had to switch providers and dispose of his cellular phone at
this specific time, that is, approximately two weeks after he was mailed the Notice
and should have been aware of the allegations of the lawsuit.

1 when or if the records can be located. Hurley Decl. Ex. 15. Had Defendant Charlie
2 Ferrara preserved or requested these records when he became aware of the lawsuit
3 in early August 2016, when he retained counsel around the time of his appearance
4 in the case at the August 29, 2016 initial case management conference, when he
5 received the document requests from Plaintiffs in November 2016, or even when
6 his counsel was meeting and conferring with Plaintiffs' counsel from January 2017
7 to June 2017 regarding these very records, the now lost records would have been
8 available to him. However, it was not until after the Court ordered production of
9 the records on July 13, 2017 that Defendant Charlie Ferrara attempted to locate and
10 produce these records. By that time, the records from December 15, 2015 through
11 February 24, 2016 no longer had to be retained according to Sprint's policy and
12 were no longer readily available to Defendant Charlie Ferrara. The Court finds that
13 the failure to preserve these records until after the Court ordered production in July
14 2017 was not reasonable.

15 Accordingly, the Court concludes that both Ferrara Defendants failed to take
16 reasonable steps to preserve electronically stored information that should have been
17 preserved in the anticipation or conduct of litigation, and the electronically stored
18 information was lost as a result and cannot be restored or replaced through
19 additional discovery.

20 ii. Sanctions

21 The spoliation analysis next turns to whether sanctions are warranted, and, if
22 so, the severity of the measures. The harsh sanctions pursuant to Rule 37(e)(2) are
23 available only upon finding that the Ferrara Defendants acted with the intent to
24 deprive Plaintiffs of the information's use in the litigation, while only a finding of
25 prejudice to Plaintiffs from loss of the information is required for the Court to order
26 measures "no greater than necessary to cure the prejudice" under Rule 37(e)(1).

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1 a. *Intent to Deprive*

2 Plaintiffs argue that because the Ferrara Defendants had a clear awareness of
3 the lawsuit but failed to preserve or destroyed relevant evidence, Defendants acted
4 with the intent to deprive Plaintiffs of their use of this evidence for their litigation.
5 MPA at 11.

6 Defendant Frank Ferrara argues that there is no evidence he intentionally
7 destroyed any of the nine unrecovered messages. Ferrara Opp'n at 7. His forensic
8 analyst declares that there was no indication that any software or application was
9 installed to wipe data from his phone. *Id.* In addition, hundreds of other text
10 messages from around the same time period as the unrecoverable text messages
11 exchanged with Defendant Lee were also not available for recovery. *Id.*

12 Defendant Charlie Ferrara contends that because the duty to preserve had not
13 attached when he disposed of his old cellular phone, this action does not rise to
14 even negligence under the circumstances. Ferrara Opp'n at 17-18. With respect to
15 the cellular phone bills, counsel is in the process of remedying the situation with the
16 pending request to Sprint. *Id.* at 17, Hurley Decl. ¶ 17 & Ex. 15.

17 The Court finds that Frank Ferrara's failure to preserve his cellular data,
18 including text messages with codefendants, for well over a year constitutes at least
19 gross negligence. Similarly, the Court finds that Defendant Charlie Ferrara's
20 disposal of his cellular phone after becoming aware of the lawsuit constitutes at
21 least negligence and Defendant Charlie Ferrara's failure to preserve his cellular
22 phone records for well over a year after he appeared in the action constitutes at least
23 gross negligence. However, the Court is not persuaded at this time that either of the
24 Ferrara Defendants intentionally deleted text messages or failed to preserve
25 evidence with the intent to deprive Plaintiffs of their use of the evidence in
26 litigation. At this time, the Court does not find that Plaintiffs have offered
27 sufficient evidence to warrant the severe sanctions that may be imposed under Rule
28 37(e)(2).

1 As with Defendant Lee, the Court finds that Plaintiffs have not had the
2 opportunity to fully develop the record regarding intent and spoliation by the
3 Ferrara Defendants. Plaintiffs were not aware that there were any unrecoverable
4 text messages until after the Court ordered production of the cellular phone records
5 on July 13, 2017. Defendant Charlie Ferrara was deposed on July 7, 2017 and
6 Frank Ferrara was deposed on July 10, 2017. *See* Hurley Decl. Exs. 3, 4. It would
7 be unfair to expect Plaintiffs to have been able to fully probe spoliation and the
8 intent behind the destruction or failure to preserve evidence when Plaintiffs were
9 unaware that any evidence previously in possession or under the control of the
10 Ferrara Defendants was unrecoverable, and various documents related to the
11 evidence was not available yet to Plaintiffs. *See supra*, Section IV.B.ii. Plaintiffs
12 should not be precluded from presenting evidence at trial as to whether the Ferrara
13 Defendants acted with the intent to deprive Plaintiffs of the use of the evidence.

14 b. *Prejudice*

15 Because the Court declines to find that the harsh sanctions under Rule
16 37(e)(2) are warranted at this time, the Court turns to whether less severe measures
17 under Rule 37(e)(1) are necessary to cure any prejudice to Plaintiffs from the loss
18 of the evidence at issue.

19 Plaintiffs argue that the lost evidence was relevant as Plaintiffs have alleged
20 in their Complaint that Defendants conspired to exclude Plaintiffs and other
21 individuals from accessing and enjoying a public space via phone calls, text
22 messages and email. MPA at 13. Although Plaintiffs have not been able to recover
23 any of the lost text messages at issue for the Ferrara Defendants, Plaintiffs have
24 been able to obtain the contents of three text messages exchanged between
25 Defendant Lee and other codefendants. MPA at 15 n.13; Lee Reply at 1. At least
26 two of these text messages relate to incidents alleged in the complaint. *Id.*¹²

27 ¹² Plaintiffs were able to recover a text message exchanged between Defendant Lee
28 and Defendant Angelo Ferrara on January 29, 2016 that asks locals to come out to

1 Plaintiffs argue that have been prejudiced as they have been forced to oppose
2 motions for summary judgment brought by Defendants based on lack of evidence.
3 *Id.* at 13. In addition, Plaintiffs will be prejudiced at trial in having to establish
4 their claims without the use of the contents of these text messages. *Id.* at 14.

5 The Ferrara Defendants argue that there is no factual support that the fifteen
6 unrecoverable text messages contain any information that is relevant to the case.
7 Ferrara Opp'n at 18.

8 The Court finds that Plaintiffs have suffered and will continue to suffer
9 prejudice from the loss of these text messages and cellular data. The text messages
10 at issue were exchanged between codefendants in this lawsuit. The few text
11 messages exchanged between codefendants that Plaintiffs were able to recover from
12 other sources contain communications that appear to be highly relevant to the
13 action, suggesting that other text messages exchanged between codefendants would
14 also contain relevant content. The Court finds that Plaintiffs have already been
15 prejudiced in having to oppose motions for summary judgment without this
16 potentially relevant evidence. In addition, Plaintiffs will be prejudiced at trial by
17 not being able to present or rely on the contents of these text messages. With
18 respect to Defendant Charlie Ferrara, Plaintiffs are also prejudiced because they are
19 without any records of phone calls or text messages exchanged during a highly
20 relevant period of time surrounding the alleged incidents of harassment of the
21 named Plaintiffs.

22 ///

23
24 Lunada Bay in response to certain individuals coming to the bay to surf. Wolff
25 Decl. ¶ 36. In addition, Plaintiffs were able to recover a series of text messages
26 exchanged between Defendant Papayans, Defendant Lee and other individuals on
27 January 29, 2016 which references two individuals at the bay and asks others to
28 join. Wolff Reply Decl. Ex. 2. January 29, 2016 is the date Plaintiff Reed
allegedly visited Lunada Bay with a friend and when they were allegedly harassed
by members of the Lunada Bay Boys. *See* Compl. ¶ 22.

1 c. *Appropriate Sanctions to Cure the Prejudice*

2 Plaintiffs request as sanctions that the jury be instructed that the spoliated
3 evidence was unfavorable to these three defendants and that the Court designate as
4 established the fact that a conspiracy exists between Defendants Lee, Frank Ferrara,
5 and Charlie Ferrara. MPA at 15. Plaintiffs also request that the Court deny these
6 three Defendants' motions for summary judgment. *Id.*

7 The Ferrara Defendants contend that the nine text messages exchanged with
8 Defendant Lee form the single thread connecting him to Plaintiffs' claimed harm in
9 the case, and no parties have testified that he participated in any actions or inactions
10 supportive of Plaintiffs claims. Ferrara Opp'n at 7. Similarly, the Ferrara
11 Defendants argue that the six text messages Charlie Ferrara exchanged with
12 Defendant Lee form the only basis for Plaintiffs contention that Charlie Ferrara was
13 connected to Plaintiffs' claimed harm. *Id.* at 11. The Ferrara Defendants argue that
14 because Plaintiffs present no evidence that the text messages or cellular phone
15 billing records at issue contained any information relevant to the action, Plaintiffs'
16 requested sanction is not justified. *Id.* at 17.

17 With respect to Plaintiffs' request that the Ferrara Defendants' motions for
18 summary judgment be denied, counsel for the Ferrara Defendants represented at the
19 October 12, 2017 hearing that they may be amenable to withdrawing their motions
20 for summary judgment and would be willing to meet and confer with Plaintiffs'
21 counsel. The Court ordered counsel to meet and confer by October 16, 2017. Dkt.
22 No. 489. On October 16, 2017, the Ferrara Defendants withdrew their motions for
23 summary judgment. Dkt. No. 491.

24 With respect to Plaintiffs' requests for an adverse inference instruction or a
25 designation that a conspiracy is established as a fact, the Court finds that these
26 severe sanctions are not warranted because the Court has not found that the Ferrara
27 Defendants acted with the intent to deprive Plaintiffs of the use of the lost evidence
28 in the litigation.

1 In assessing other less severe sanctions to cure the prejudice to Plaintiffs by
2 the Ferrara Defendants' spoliation of evidence, the Court has carefully considered
3 the prejudice to Plaintiffs in this case and recommends that monetary sanctions be
4 imposed and additional discovery ordered with expenses shifted to the Ferrara
5 Defendants.

6 The Court recommends that the Ferrara Defendants be ordered to pay
7 monetary sanctions in the form of reasonable attorneys' fees incurred by Plaintiffs
8 in bringing their Motion. The Court notes that Plaintiffs agreed not to seek further
9 monetary sanctions from the Ferrara Defendants for the alleged spoliation of
10 evidence in resolving their request for monetary sanctions based on the Ferrara
11 Defendants' failure to comply with the Court's July 13, 2017 order. However, the
12 Court finds that the parties' agreement does not preclude the Court from awarding
13 additional attorneys' fees as sanctions in order to cure, in part, the prejudice to
14 Plaintiffs from the spoliation. Because the prior agreed-upon amount between the
15 parties would have covered expenses incurred up to resolution of the prior request
16 for sanctions, the Court will limit the monetary sanctions award to the reasonable
17 attorneys' fees and costs incurred by Plaintiffs in pursuing their Motion against the
18 Ferrara Defendants starting from the September 5 hearing.

19 In addition, because Plaintiffs have not had the opportunity to fully explore
20 the spoliation issues and the level of culpability or intent behind the failure to
21 preserve the text messages and cellular phone billing records, the Court
22 recommends that Plaintiffs be permitted to depose both of the Ferrara Defendants
23 for a second time. The Court recommends that fees and costs incurred by Plaintiffs
24 in taking the depositions be shifted to the Ferrara Defendants and included in the
25 monetary sanctions award. It is recommended that Plaintiffs be ordered to submit a
26 declaration and records in support of reasonable attorneys' fees and costs within
27
28

1 thirty days of any Order accepting this Report,¹³ and the Ferrara Defendants be
2 ordered to file any response within fourteen days of that submission.

3 Finally, the Court recommends that Plaintiffs be permitted to submit
4 evidence concerning what evidence was destroyed, when the Ferrara Defendants
5 had notice of the litigation, and the Ferrara Defendants' intent with regard to the
6 destruction of the evidence. Although the Court declines to recommend as a
7 sanction at this time that an adverse inference jury instruction be given at trial, the
8 Court notes that, depending on the sufficiency of Plaintiffs' evidence at trial
9 regarding intent, the District Court may decide at trial whether to give an adverse
10 inference instruction. *See* Committee Notes. Alternatively, if the intent finding is
11 left for the jury, the District Court may instruct the jury that it may infer from the
12 loss of the information that it was unfavorable to the party that lost it only if the
13 jury first finds that the party acted with the intent to deprive another party of the
14 information's use in litigation. *See id.*

15 V. RECOMMENDATION

16 For the reasons discussed above, **IT IS RECOMMENDED** that the District
17 Court issue an Order approving and accepting this Report and Recommendation,
18 and ordering that Plaintiffs' Motion for Sanctions (Dkt. No. 425) be granted in part
19 as follows:

20 (1) Plaintiffs be granted monetary sanctions against Defendants Charlie and
21 Frank Ferrara, in an amount to be determined at a later date by the Magistrate Judge
22 after further submissions by the parties;

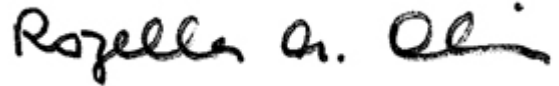
23 (2) Plaintiffs be permitted to depose Defendants Charlie and Frank Ferrara
24 regarding issues relevant to spoliation, with costs and fees incurred by Plaintiffs to
25 be included in the award of monetary sanctions;

26
27 ¹³ The Court recommends that the declaration be due thirty days from any Order
28 adopting the Report to allow for Plaintiffs to schedule and take the two additional
depositions and include those fees and costs in their declaration.

1 (3) Plaintiffs be permitted to depose Defendant Lee regarding issues relevant
2 to alleged spoliation, costs to be shared by Plaintiffs and Defendant Lee; and

3 (4) At trial, the parties be permitted to present evidence and argument related
4 to the unrecoverable text messages for Defendant Lee and the Ferrara Defendants
5 and the unavailable cellular billing records for Charlie Ferrara.

6
7 DATED: October 18, 2017



8
9 ROZELLA A. OLIVER
UNITED STATES MAGISTRATE JUDGE

10
11 **NOTICE**

12 Reports and Recommendations are not appealable to the Court of Appeals,
13 but may be subject to the right of any party to file objections as provided in Local
14 Civil Rule 72 and review by the District Judge whose initials appear in the docket
15 number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure
16 should be filed until entry of the Judgment of the District Court.